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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 United States of America, ) CV 12-08237-PCT-DGC (MHB)  
10 Plaintiff, ) CR 06-626-PCT-DGC  
11 v. )  
12 Kendrick Begay, ) **SUPPLEMENTAL REPORT**  
13 Defendant/Movant. ) **AND RECOMMENDATION**  
14 \_\_\_\_\_

15 TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

16 On November 28, 2012, Movant Kendrick Begay, who is confined in the United  
17 States Penitentiary in Pollock, Louisiana, filed a Motion Under 28 U.S.C. § 2255 to Vacate,  
18 Set Aside, or Correct Sentence by a Person in Federal Custody (hereinafter “§2255 motion”),  
19 a Memorandum in Support of the Motion, and a Motion to Appoint Counsel.<sup>1</sup> (CV12-8237  
20 (“CV”) Docs. 1-3; CR 06-00626 (“CR”) Docs. 111-113.) Plaintiff United States of America  
21 (the “Government”) filed its Response on March 15, 2013, and Movant filed his reply on  
22 April 17, 2013. (CVDocs. 6, 7.) On August 16, 2013, this Court filed a Report and  
23 Recommendation recommending that Movant’s §2255 motion be denied. (CVDoc. 8.)  
24 Movant thereafter filed Objections to this Court’s findings and recommendations as to three  
25 of his eleven claims. (CVDoc. 11.)  
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28 <sup>1</sup>The motions and memorandum were all filed by attorney Dan Drake, on Movant’s  
behalf. On January 22, 2013, the Court appointed Mr. Drake to represent Movant. (CV Doc.  
5.)

1 After filing his Objections, Movant moved for, and on November 5, 2013, presiding  
2 District Court Judge Campbell granted an expansion of the record to include evidence of  
3 pawn transactions, and referred the case to undersigned “for consideration of the expanded  
4 record.” (CVDoc. 15.) Judge Campbell found that two documents submitted in support of  
5 the motion to expand were “relevant to the consideration of Movant’s ineffective assistance  
6 of counsel claims.” (*Id.*, at 3.) Those documents consisted of (1) an FBI agent report  
7 documenting a 2002 interview of Movant, during which he provided the agent several pawn  
8 shop tickets relating to the pawning of firearms, and (2) a T&R Market pawn shop ticket  
9 indicating Movant pawned a Norinco SKS rifle on January 5, 2002. (CVDocs. 12-1, 12-2.)

Movant filed several discovery motions between November 14, 2013 and January 30, 2014. (CVDocs. 16, 22, 27.) Movant also moved for, and was granted a deposition of Movant’s trial counsel. (CVDocs. 35, 39, 41.) On July 8, 2014, Movant filed a Supplement to Claim and Motion to Amend and Supplement, in which he supplements claims one and nine in his §2255 motion that (1) trial counsel rendered ineffective assistance by failing to investigate an alternative shooter (Alfred Bennie Lee Jr.) theory of defense, and (2) trial counsel rendered ineffective assistance by failing to investigate and present evidence that Movant did not have access to the weapon used in the murder (pawn shop evidence). (CVDoc. 65.) On August 4, 2014, the Government filed its Response to Movant’s Supplement. (CVDoc. 67.) This Court ordered that no reply be filed without an order from the Court, and no order was issued. (CVDoc. 63.)

## BACKGROUND<sup>2</sup>

### A. Statement of Facts - Trial.<sup>3</sup>

24       <sup>2</sup>This Court repeats the background from the original Report and Recommendation  
25 for the convenience of the reader.

26       <sup>3</sup>The statement of facts are derived from the 9th Circuit *en banc* Opinion, affirming  
27 Movant's conviction on appeal, unless otherwise noted. See, United States v. Begay, 673  
28 F.3d 1038 (9th Cir. 2011), cert. denied, 132 S. Ct. 754, 181 L. Ed. 2d 508 (2011). (CRDoc.  
110.)

1       In the early morning hours of March 28, 2002, Movant left a party in Greasewood,  
 2 Arizona driving his truck, with passengers Loren Clark, Jessica Lee, Emmanley Begay (no  
 3 relation to Movant), and Movant's sister Mecheryl Begay. Only Loren Clark and Jessica  
 4 Lee testified in Movant's trial (hereinafter "Lee" and "Clark"). According to Clark, around  
 5 2:00 a.m., Movant drove passed the victims, J.T.<sup>4</sup> and O.C., driving in the opposite  
 6 direction. Movant flashed his truck lights at their vehicle, and both vehicles pulled off of  
 7 the highway and parked on a dirt side road. Movant got out of his truck and stood for a  
 8 minute by the driver-side door of J.T. and O.C.'s vehicle. He then walked back to his  
 9 truck, retrieved a rifle<sup>5</sup>, walked back to the passenger side of the victim's vehicle and fired  
 10 eight or nine shots into the vehicle. Movant walked back to his vehicle and placed the gun  
 11 under the back seat. As Movant walked back to his truck, Mecheryl began screaming and  
 12 making horrible cries, asking him "What did you do?" or "Why did you do that?" Movant  
 13 told his sister to be quiet. Clark was outside Movant's vehicle, having exited to relieve  
 14 himself, and asked Movant why he had shot the victims.<sup>6</sup> Movant did not respond.  
 15 Movant, Clark and Mecheryl drove away, leaving Lee behind. Prior to the shooting, Lee  
 16 was in the rear of Movant's truck in a comatose state having consumed too much alcohol.  
 17 The gunshots aroused her, at which point she exited the vehicle to vomit.<sup>7</sup> As she walked  
 18 away from the scene, Lee observed O.C. attempting to hold J.T. upright and that J.T. had  
 19 blood on his shirt.

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22       <sup>4</sup>Because the victims were minors, they are referred to using only their initials. See  
 23 18 U.S.C. § 3509(d).

24       <sup>5</sup>Testimony at trial indicated that the bullets recovered from the scene were .30 caliber  
 25 and could have been fired from many different types of rifles. (CRDoc. 91, at 75, 88, 113.)

26       <sup>6</sup>The transcript of the trial reflects that Clark testified that he asked Movant "what the  
 27 hell are you doing," not why he "shot the victims." (CRDoc. 91, at 141.)

28       <sup>7</sup>She did not observe the shootings, but heard the gunshots, and heard Mecheryl  
 screaming and crying.

1       O.C. drove to the home of Clark's mother to seek help. By that time, J.T. was  
 2 already dead. O.C. was thereafter transported to a local hospital before being transferred  
 3 to a hospital in New Mexico. O.C. died from her wounds three days later.

4       The FBI and Navajo investigators began investigating the murders but initially  
 5 failed to make any significant progress. Witnesses interviewed denied being out on the  
 6 night of the homicides<sup>8</sup>, and Movant told investigators that he was with his girlfriend the  
 7 entire night. Investigators located the crime scene two weeks after the homicides and  
 8 located glass and six .30 caliber shell casings on the ground.

9       Six months later, in the Fall of 2002, Lee contacted the FBI and told them (over the  
 10 course of several months - see fn 8), and later testified at trial, that she had been at a party  
 11 that night with Movant, Mecheryl Begay, Clark, and Emmanley Begay. She admitted to  
 12 drinking and that her memory had been impaired, but that she did remember leaving the  
 13 party with the group. Lee stated she had passed out in the vehicle, but awoke upon hearing  
 14 gunshots. She saw the victims after they had been shot. Lee testified that a few days after  
 15 the murders she asked Movant what she should tell the police about the murders, and  
 16 Movant told her to blame it on two other men. Lee and Movant never spoke again.

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19       <sup>8</sup>In fact, both Clark and Lee, when initially contacted denied knowledge of the events.  
 20 Clark stated to the FBI on March 29, 2002, that Movant had pawned all of his guns, and  
 21 stated in an April 8, 2002, interview that he ran into Movant after the homicides and had a  
 22 "sickening feeling that Movant was involved." (CRDoc. 93, at 15-20.) Clark did not admit  
 23 the facts he testified to at trial until May, 2006. (Id., at 21.) Movant was not indicted until  
 24 June 27, 2006. (CRDoc. 1.) Lee contacted the FBI several months after the homicides after  
 25 seeing the phone number on a reward poster, and initially denied knowing who was  
 26 responsible for the homicides as she was highly intoxicated and had a "foggy memory," and  
 27 suggested that the FBI contact Mecheryl Begay, Ervin Begay, Halbert Yazzie, and Alfred  
 28 Bennie Lee because there were rumors in the community that they were involved in the  
 homicides. (CRDoc. 93, at 34-38, 46-50, 53) Lee testified at trial that it wasn't until several  
 contacts with the FBI, and approximately **19 months** after the homicides that Lee "told the  
 truth" and implicated Movant. (Id., at 59-61.) Lee also testified at trial that Movant had  
 urged her to say, when asked, that either Ervin Begay, Halbert Yazzie or Alfred Bennie Lee  
 were the ones who committed the crimes. (Id., at 44-45.)

1       The next break in the investigation came four years after the shootings, in May  
 2 2006, when the FBI re-contacted Clark, and he implicated Movant for the first time.  
 3 Although Lee only witnessed the shooting's aftermath, Clark was the sole witness to testify  
 4 to the events leading up to the shooting itself. Clark testified at trial that he had attended  
 5 a party the night of the shootings with Movant and other friends. Clark, Movant and the  
 6 friends left the party and got into a truck driven by Movant. Clark recalled Movant pulling  
 7 his vehicle off the road, at which time Clark exited the vehicle to relieve himself. He stated  
 8 that he observed Movant from a distance, appearing simply as "a black figure" in the night,  
 9 walk initially to the victims' car, stand by the car for a minute or two, then walk back to his  
 10 truck and retrieve an object from the driver's side, and then walk back to the victims' car.  
 11 He saw Movant lift the object he had retrieved from the truck up to his shoulder and then  
 12 heard gunshots and saw sparks. Clark recognized the gunshots coming from a rifle that  
 13 Movant had used on previous occasions when he and Clark had gone shooting together.

14       When the gunfire ceased, Clark asked Movant why he shot the victims, but Movant  
 15 did not respond.<sup>8</sup> Movant simply told Clark to get back into the truck. Later that night  
 16 when Movant dropped Clark off at his house, Movant told Clark to keep quiet. The next  
 17 morning, Movant told Clark not to say anything to the FBI, and to "watch himself."  
 18 Movant also told Clark to "watch his back" several times after the shootings.

19       Movant proceeded to trial and, on June 26, 2007, was convicted of two counts of  
 20 First-Degree Murder, and two counts of Using, Brandishing, or Discharging a Firearm in  
 21 Relation to a Crime of Violence. (CRDoc. 66.) Movant was sentenced to life  
 22 imprisonment on the murder counts, to be followed by consecutive sentences of 120-  
 23 months and 300-months, for a total of 35-years for the firearms convictions. (CR Doc. 70.)

24       B. Statement of Facts - Appeal.

25       Movant appealed his conviction and sentence. (CR Doc 71.) A three-judge panel  
 26 reversed the murder convictions on grounds of insufficient evidence, affirmed the firearms

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28       <sup>8</sup>See, fn 5, supra.

1 convictions, and found that the trial court did not err in admitting at trial evidence of  
 2 Movant's intimidation of witnesses Clark and Lee. United States v. Begay, 567 F.3d 540,  
 3 550 (9th Cir. 2009), cert. denied, 132 S. Ct. 754 (2011). The case was reheard *en banc*, and  
 4 the panel affirmed Movant's convictions. United States v. Begay, 673 F.3d 1038 (9<sup>th</sup> Cir.  
 5 2011). The panel reversed the 3-judge panel's finding that there was insufficient evidence  
 6 presented at trial of premeditation, and found without merit Movant's claims that (1) the  
 7 district court erred when it refused to instruct the jury on a lesser included offense of  
 8 voluntary manslaughter; (2) the evidence that Movant intimidated Clark and Lee was  
 9 inadmissible under Federal Rules of Evidence 403 and 404(b); and (3) the prosecutor  
 10 engaged in misconduct by misstating the elements of premeditation during closing  
 11 argument. Id.

12                   C. Motion under 28 U.S.C. §2255 - Supplemental Evidence.

13                   Movant raised eleven claims in his §2255 motion. This supplemental report and  
 14 recommendation only addresses claims one and nine - ineffective assistance of counsel  
 15 claims- as Movant asserts that, since the filing of the original report and recommendation,  
 16 additional evidence has surfaced in support of these claims.<sup>9</sup>

17                   **STANDARD**

18                   The two-prong test for establishing ineffective assistance of counsel was set forth  
 19 by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an  
 20 ineffective assistance claim, a convicted defendant must show (1) that counsel's  
 21 representation fell below an objective standard of reasonableness, and (2) that there is a  
 22 reasonable probability that, but for counsel's unprofessional errors, the result of the  
 23 proceeding would have been different. See id. at 687-88. There is a strong presumption

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 25                   <sup>9</sup>18 U.S.C. §2255 requires the court to hold an evidentiary hearing “[u]nless the  
 26 motion and the files and records of the case conclusively show that the prisoner is entitled  
 27 to no relief.” See, United States v. Burrows, 872 F.2d 915, 917 (9th Cir. 1989) (citations  
 28 omitted) (an evidentiary hearing is usually required if a claim is based on matters outside the  
 record). This Court did not hold an evidentiary hearing in this case, as the parties do not  
 dispute the facts, only the significance of them.

1 that a counsel's conduct falls within the wide range of reasonable assistance. See id. at  
 2 689-90. The inquiry under Strickland is highly deferential and "every effort [must] be  
 3 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of  
 4 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at  
 5 the time." Id. at 689. The burden is on the defendant to overcome this presumption.  
 6 Michel v. Louisiana, 350 U.S. 91, 101 (1955). The strategic choices a counsel makes after  
 7 thoroughly investigating the law and the facts of the case are unlikely to withstand a  
 8 challenge. Strickland, 466 U.S. at 690-91. The Ninth Circuit has held that counsel must  
 9 conduct a "reasonable investigation" in order to make informed decisions about how to best  
 10 represent the client, and must make "reasonable decisions" about what particular  
 11 investigation is unnecessary. Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995)  
 12 (citations omitted). Without an identification of what benefit additional investigation  
 13 would reveal, a defendant cannot meet the prejudice prong of the Strickland test. Id., 70  
 14 F.3d at 1042 (citing James v. Borg, 24 F.3d 20, 26 (9<sup>th</sup> Cir. 1994)).

## 15 CLAIMS

16 Claim One - trial counsel rendered ineffective assistance by failing to investigate an  
 17 alternative shooter (Alfred Bennie Lee Jr.) theory of defense.

18 A. Evidence of Lee Jr.'s "Confession."

19 Movant alleges that Loyd Tate, Movant's trial counsel, was ineffective in failing to  
 20 properly investigate an alternative shooter theory. Movant alleges that trial counsel failed  
 21 to present evidence that Albert Bennie Lee Jr. ("Lee Jr.") confessed to the crimes. In his  
 22 opening statement, Movant's trial counsel told the jury that it was going to hear that "a  
 23 couple of other people, yes, Mr. Alfred Bennie Lee Jr. was responsible for this murder."  
 24 (CVDoc. 2 at 3; CRDoc. 91, at 24-25.) Trial counsel attempted to bring in Lee Jr.'s  
 25 confession through agent Jones, who was aware of the statement Lee Jr. allegedly made to  
 26 a Navajo Nation police officer, but the Government's hearsay objection was sustained.  
 27 (CRDoc. 91, at 107-110.) Trial counsel stated that "[o]ur contention is going to be that  
 28 Alfred Benny (sic) Lee Jr. confessed to these murders," and argued that the evidence was

1 the “heart” of his case. (Id.) Trial counsel suggested that the statements weren’t hearsay,  
2 because they were being introduced to explain agent Jones’s mental state “as to what he  
3 then [did in his investigation]” (Id.) Trial counsel also attempted to introduce Lee Jr.’s  
4 confession through witness Jessica Lee, by asking her if she was aware of the confession,  
5 but again, the Government’s hearsay objection was sustained. (CRDoc. 93, at 56-57.) The  
6 trial court instructed the jury at the beginning and end of the trial that statements or  
7 questions of counsel are not evidence. (CRDoc. 91, at 6; CRDoc. 95, at 63.) No evidence  
8 of Lee Jr.’s confession was ultimately presented at trial. (CVDoc. 2, at 4.)

9       The evidence of Lee Jr.’s confession was provided by the Government to Movant  
10 and consisted of private investigator Reuben Martinez’s August 26, 2006, memorandum  
11 of a report of telephonic contact with Dorasita Begay (hereinafter “Begay”), a Navajo  
12 Nation Police Officer working out of Dilkon, Arizona. (CVDoc. 14-2.) Mr. Martinez  
13 reported that Begay told him that she was familiar with the shooting of the victims in this  
14 case, and that prosecution witness Jessica Lee had been a friend of Begay’s for most of her  
15 life. (Id.) Begay also stated that Jessica Lee had worked for her grandfather, Alfred  
16 Bennie Lee Sr., who was a bootlegger on the Navajo nation, and that Lee Sr., would  
17 sometimes take firearms in receipt, which Lee Jr., his son, would sometimes sell. (Id.)  
18 Begay reported to Martinez that Jessica Lee was known to be a liar especially when under  
19 pressure.

20       Begay also told Martinez that two weeks previously she had been involved in a high  
21 speed chase involving Lee Jr. (CVDoc. 14-2.) Begay reported that:

22       Lee had two occupants in the vehicle who told her that during the chase Lee,  
23 the driver, attempted to load a handgun he had. She was told that the  
24 occupants took the weapon away from Lee so he would not do anything  
25 stupid if and when he was confronted by the police. She advised that she  
26 handcuffed Lee, who she indicated was drunk, and placed him in her patrol  
27 car. When Lee complained that the handcuffs were too tight, she attempted  
28 to loosen them. Lee broke away from her, and she was eventually able to re-  
arrest him after a foot chase.

29       Lee, who suffers from a heart condition, then told her that he was tired of  
30 running. He asked her if she remembered the shooting of those two people.  
31 She told him that she did. Lee then told her that he was the one that shot  
32 them. He told her that he used a 30.06 rifle to shoot them, and that the

1 shooting was over a drug deal that went bad.<sup>10</sup> He indicated that he was  
 2 owed \$100.00 for drugs he had sold them. Lee asked her if Kendrick  
 3 (Begay) was okay, as he knew that Kendrick was being charged with the  
 4 murders. Begay advised that she told Lee that he was drunk and that he had  
 5 better stop talking.  
 6 (CVDoc. 14-2.)

7 After learning of the Martinez report, approximately 3-weeks later, FBI agents  
 8 interviewed Begay at her place of employment, the Navajo Department of Public Safety.  
 9 (CVDoc. 14-3.) Begay reported that Jessica Lee is her cousin and came to live with her  
 10 family on and off as a teenager as her father had died and her mother had abandoned her.  
 11 (Id.) She further related that the basis for her earlier statement to Martinez that Jessica  
 12 would lie to get out of trouble was based upon her behavior as a teenager sneaking out late  
 13 at night and cut school with friends. (Id.) Begay also clarified that Lee Sr. is also Lee's  
 14 grandfather. Lee Jr. is their uncle. (Id.)

15 Begay described her high speed chase of Lee Jr., in more detail to the FBI agents:  
 16 Approximately one month ago, she was dispatched to a disturbance call at  
 17 her grandfather's house. Another officer was also dispatched to the call.  
 18 When they arrived, they were told by her grandfather that "Junior",  
 19 Raymond Begay, Norbert Begay, and Monica Begay were all at his residence  
 20 and were fighting but they had left just before they arrived in Raymond  
 21 Begay's red Dodge pickup. Dorasita and the other officer drove around the  
 22 area and she passed the truck on Indian Route 15. Dorasita did a u-turn and  
 23 pursued the truck in order to pull it over the truck pulled away at a high rate  
 24 of speed. As she pursued, the truck passed several other vehicles in a very  
 25 unsafe manner. Dorasita backed off and kept the truck under observation  
 26 because she did not want the pursuit to cause an accident. Dorasita observed  
 27 the truck exit the main road and on to a dirt road and then another dirt road.  
 28 Dorasita continued to follow but the other unit got separated from them on  
 the dirt roads. Dorasita realized they were going to Raymond Begay's house  
 and was close enough to them to see the pickup stop and see "Junior" get out  
 of the driver's side and run around to the back of the house. Dorasita  
 pursued and found "Junior" sitting down behind the house and handcuffed  
 him then placed him in the back of her patrol car. Norbert Begay and  
 Monica Begay were still in the truck and Raymond had gone into the house.  
 Monica Begay showed Dorasita a gun that was in the truck and stated that  
 "Junior" was trying to load it while they were being pursued. Dorasita took  
 the gun and later booked it as evidence. Dorasita did not think it was safe to  
 attempt a field sobriety check on "Junior" and she knew he had a heart  
 condition and she would not be able to book him into the jail as the Navajo

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 30 <sup>10</sup>During trial, Movant's counsel attempted unsuccessfully to introduce the fact that  
 31 an anonymous caller had telephoned the police just days after the homicides and stated to the  
 32 dispatcher that the killings were for a drug deal gone bad. (CRDoc 91, at 95-101.)

1 Nation has a policy of not accepting prisoners with health issues so she cited  
 2 him for reckless driving and no driver's license. Dorasita then drove  
 3 "Junior" back to his residence in Greasewood Springs.

4 Dorasita said on the way back to the residence "Junior" started  
 5 complaining about the handcuffs being too tight. Dorasita stopped and got  
 6 out of the patrol car to loosen the cuffs and as she was doing so, "Junior"  
 7 was able to get away and ran to the other side of the road. Dorasita pursued  
 8 and caught "Junior" just as he reached the side of the road. Because of  
 9 "Junior's" heart condition, he could not run far or fast. After "Junior" was  
 10 again secured in the vehicle, he stated he was tired of running and wanted to  
 11 talk to the FBI or a Criminal Investigator (CI), someone he could trust.  
 12 "Junior" started crying and rambling saying he was the one who shot those  
 13 kids. Dorasita said she told him she would arrange to have a CI talk to him  
 14 but she did not want to get involved. "Junior" continued to talk saying, "it  
 15 was me, I shot him with a 30.06; I didn't mean to shoot the girl." "Junior"  
 16 did not say how many times he shot he just held his arms up simulating that  
 17 he had a rifle and she assumed he only shot once. "Junior" also asked if  
 18 Kenderick was okay. After making these comments, Dorasita told "Junior"  
 19 he was drunk and to stop talking. Dorasita said when she got "Junior" to the  
 20 house, his wife, Colleen was there and after she got him in the house, she  
 21 forgot to get him to sign the citation. Dorasita said she never did talk to a CI  
 22 about the statements "Junior" made nor did she attempt to contact anybody  
 23 with the FBI.  
 24 (CVDoc. 14-2.)

25 Dorasita also told investigators that she was on paid administrative leave because  
 26 of a public intoxication arrest by the Navajo Police. She did not prepare a report of her  
 27 encounter with Lee Jr. (CVDoc. 91, at 109.)

28 FBI agents subsequently interviewed Lee Jr. on December 5, 2006. (CVDoc. 14-4.)  
 1 Lee, Jr. indicated that he is related to Dorasita Begay, and recalled the night that she had  
 2 pursued him in her patrol car. (Id.) He told the agents that, at some point during his  
 3 contact with Dorasita, "because of his intoxicated state and his level of frustration with the  
 4 Navajo Police," he stated to Dorasita, something to the effect of: "[w]hy don't you take  
 5 me to jail for killing those kids." (Id.) Lee Jr. said that he was drunk and mad at the  
 6 Navajo police and that he had said something like, "[y]ou're always harassing me; you're  
 7 always trying to convict me of something; so why don't you just take me to jail for killing  
 8 those kids?" (Id.) Lee Jr. denied having anything to do with the shootings and did not  
 9 know who was responsible. (Id.)

## 1 B. Trial counsel's Investigation.

2 Trial counsel stated in his deposition that Movant told him from the beginning of  
 3 his representation that he was innocent. (CVDoc. 71-1, at 19.) Although trial counsel  
 4 obtained approval from the Court to pay an investigator to assist him, he did not utilize the  
 5 investigator to interview any witnesses. (CRDoc. 23; CVDoc. 27, at 5; CVDoc 71-1, at  
 6 51.) Trial counsel was aware of the "confession" of Lee Jr., and wanted to get it before the  
 7 jury. (CVDoc. 71-1, at 20-23.) In describing his thought process, trial counsel stated:

8 But I felt that the Government's counterpunch -- I didn't want -- no, let me  
 9 just say it the way I'm feeling it. I for damned sure didn't want Alfred  
 10 Bennie Lee Jr. there because he was going to remove all doubt. I wanted to  
 11 raise some doubt, but I knew she could disprove it what I was going to put  
 12 out there. So I wanted to get the subject of Alfred Bennie Lee Jr. out there  
 13 to raise reasonable doubt without having -- giving her the ability to  
 14 counterpunch or come back at me on this. Because I was weighing out and  
 15 figured, "Yea, she's going to be able to disprove this. But I wanted to get it  
 16 out in front of the jury."

(Id., at 24.)

17 When counsel for Movant asked trial counsel what was the basis for him saying in  
 18 his opening statement at trial that the jury would find that Lee Jr. committed the crimes, he  
 19 responded:

20 If we tried to bring [Lee Jr.] there, she was going to be able to go back and  
 21 disprove whatever, police officer and all that kind of stuff. I remember  
 22 asking and knowing that I was going to ask the hearsay question about [Lee  
 23 Jr.] and I remember being chided by [the trial judge] for asking the hearsay  
 24 question. But I knew we couldn't -- we didn't have a strong defense with  
 25 that. So to use other vernacular, I wanted to plant the satchel and run, get  
 26 [Lee Jr.]'s name out there connected with a confession. But I didn't want  
 27 [Lee Jr.] there, because I knew that she -- that the Government would walk  
 28 us down and -- and zoom in on making [Lee Jr.] if he was there.

(CVDoc. 71-1, at 36.)

29 Movant's trial counsel was confronted with trial witness lists that had included Lee  
 30 Jr.'s name in an earlier version, but not in a later version, and asked what he would have  
 31 done if the Government had called Lee Jr. as a witness and he denied committing the  
 32 offenses:

33 I think we end up having to bring back the officer, what's her name -- --  
 34 whatever her name was, bring her in. And I didn't want to get into her either  
 35 to bring her in. ...I wanted to get as much mileage as I could without having  
 36 to call [Lee Jr.] in because I don't expect for him to get on the stand and  
 37 confess to a double homicide. And, again, I felt the Government was going

1 to have a very effective response. So I wanted to get that in. And sometimes  
2 you want to get out as much as you can without having the witness there  
3 because of what the Government's going to get out of the witness. I believe  
4 that was my thinking for this whole [Lee Jr.] issue.  
(CVDoc. 71-1, at 48-49.)

5 To summarize, trial counsel did not attempt to interview, and elected not to call  
6 either Lee Jr., or Dorasita Begay as witnesses at trial, for strategic reasons, and thought he  
7 could introduce evidence of Lee Jr.'s confession through other witnesses. Trial counsel  
believed that the confession of Lee Jr. was the heart of his defense.

8 C. Application of law to facts.

9 Movant's trial counsel was aware of the August, 2006, statement Begay made to  
10 investigator Martinez, as well as the subsequent interviews by the FBI of Begay and Lee  
11 Jr., prior to trial. Trial counsel admitted in his deposition that he did not attempt to  
12 interview, or have interviewed either of them, and did not attempt to secure their attendance  
13 at trial. He was hoping to admit the "confession" of Lee Jr. through other witnesses, and  
14 was confident enough in his ability to do so that he told the jury in his opening statement  
15 that Lee Jr. was responsible for the murder. Trial counsel attempted to elicit the confession  
16 through agent Jones to show his mental state, and Jessica Lee, to determine whether or not  
17 she was "aware" of the confession, but the Court sustained the Government's objections,  
18 ruling that the confession was hearsay.

19 Trial counsel's attempt to introduce Lee Jr.'s confession through agent Jones and  
20 Jessica Lee was misguided and fell below an objective standard of reasonableness. His  
21 arguments to the Court were specious. Hearsay is an out-of-court statement made by a  
22 declarant that a party offers in evidence to prove the truth of the matter asserted in the  
23 statement. Fed.R.Evid. 801(c). The trial court correctly noted that "the only relevance of  
24 [the confession] is for the truth of the matter asserted that [Lee Jr.] confessed to the crime."  
(CRDoc. 93, at 57.) The trial court then asked counsel, "Is there some other relevance,"  
25 to which counsel responded, "No, sir." (*Id.*) Trial counsel simply could not articulate an  
26 evidentiary basis for the introduction into evidence of the confession of Lee Jr. through  
27 another witness.

1 Trial counsel explained his decision not to call either Lee Jr. or Begay during his  
2 deposition: that he believed Dorasita Begay to be an unhelpful witness, and that the  
3 Government would have a very effective response, that he didn't expect Lee Jr. to confess  
4 on the witness stand, and that he expected to introduce the confession through other  
5 witnesses so that he could effectively "plant the satchel and run." Trial counsel does not  
6 explain what response the Government would have, if Lee Jr. or Dorasita Begay testified  
7 at trial. In its pleadings, the Government asserts that trial counsel was "correct in his  
8 evaluation of the effectiveness of [] Begay as a witness." (Doc. 67, at 6.)

9 This Court cannot conclude that the evidence the Government has identified that  
10 would impeach Dorasita Begay would have the effect of destroying her credibility. Begay  
11 had no motive to fabricate Lee Jr.'s confession. She was Lee Jr.'s niece and apparently did  
12 everything she could to keep the confession quiet. She encouraged Lee Jr. not to repeat it,  
13 as a law enforcement officer should have reported it and didn't, told Lee Jr. that she would  
14 have an investigator talk to him but didn't follow up, did not write a report of the incident,  
15 and only gave Lee Jr. a reckless driving ticket (which she never had him sign) despite the  
16 fact that he fled law enforcement, tried to load a firearm during the chase, and drove  
17 intoxicated during a high speed chase with other individuals in the car. If anything, this  
18 "impeachment evidence" that trial counsel was concerned about and the Government  
19 asserts would destroy Dorasita's credibility is in reality strong evidence of Dorasita's  
20 motivation to cover-up Lee Jr.'s confession, and arguably add credibility to it. The fact that  
21 she may have ultimately been dismissed as a law enforcement officer for public  
22 intoxication is simply evidence consistent with her arguable willingness to compromise her  
23 law enforcement duties and responsibilities to protect the interests of a relative. In  
24 addition, Begay is a cousin to Jessica Lee, and stated that Lee had worked for Lee Jr.'s  
25 father, a bootlegger, and opined that Jessica Lee is untruthful. Begay could have been a  
26 witness to the relationship between Lee and Lee Jr., and the credibility of witness Lee.

27 In addition, although Lee Jr. was reportedly intoxicated when he confessed, and  
28 subsequently denied the statements, his description of his involvement was detailed enough

1 to lend authenticity to his confession. Lee Jr. told Dorasita that he was “tired of running,  
 2 that he “shot those kids,” that he didn’t mean to shoot “the girl,” and that he shot “him”  
 3 with a 30.06 rifle, that it was for a drug deal gone bad, and that the victim owed him  
 4 \$100.00. Lee Jr. also reportedly sold firearms that his father, Lee Sr., received in payment  
 5 as a bootlegger.

6       The Ninth Circuit has repeatedly found that “[a] lawyer who fails adequately to  
 7 investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client’s  
 8 factual innocence, or that raises[s] sufficient doubt as to that question to undermine  
 9 confidence in the verdict, renders deficient performance.” Avila v. Galaza, 297 F.3d 911,  
 10 919 (9th Cir. 2002). See also, Vega v. Ryan, 757 F.3d 960, 968 (9th Cir. 2014) (“While  
 11 *Strickland* protects strategic choices made after thorough investigation of law and facts,”  
 12 had defense counsel known of the victim’s recantation to her clergyman, “there was no  
 13 strategic reason for not calling [the clergyman] as a witness.”) (internal quotes and citation  
 14 omitted). Any argument that evidence of Lee Jr.’s confession would have harmed  
 15 Movant’s case is incredible. The evidence supported Movant’s theory of defense, and the  
 16 fact that it was not admitted deprived the jury of the opportunity to consider this evidence  
 17 and decide its significance. Trial counsel’s performance with regard to this evidence fell  
 18 below an objective standard of reasonableness.

19       Claim Two - trial counsel rendered ineffective assistance by failing to  
 20 investigate and present evidence that Movant did not have access to the  
 21 weapon used in the homicide (pawn shop evidence).

22       A. Evidence of Pawn Shop Records.

23       The evidence at issue consists of pawn shop records from T&R Market, Inc., which  
 24 show that on January 5, 2002, Movant pawned a rifle - a Norinco SKS rifle. (CVDocs. 12-  
 25 1, 12-2.) It is undisputed that trial counsel was aware of these records prior to trial.

26       B. Trial Counsel’s Investigation.

27       Testimony at trial established that the firearm used to shoot the victims was a rifle  
 28 capable of shooting .30 caliber bullets. Clark testified that three or four weeks prior to the  
 29 shootings, he had gone shooting with Movant, and that Movant had an SKS rifle that, when

1 shot, sounded like the rifle he heard the night of the shooting. (CRDocs. 91, at 140; 93, at  
2 9.) He testified that the SKS rifle that he had previously shot with Movant “had a folding  
3 stock, a 30-round clip, and it had a bayonet.” (CRDoc. 91, at 140.) Clark also testified that  
4 he told investigating officers that Movant had pawned all of his guns, and did not deny that  
5 he had gone with Movant to pawn the weapon at T&R Market (CRDoc. 93, at 17.)

6 During his deposition, trial counsel admitted that he had not done any investigation  
7 into the pawn shop records, for instance, to discover whether or not the SKS rifle in pawn  
8 “had a folding stock, a 30-round clip, and a bayonet” or whether or Clark could identify it  
9 as the one he had shot with Movant on the previous occasion, because he knew that the  
10 pawn shop evidence “would show that [Movant] pawned an SKS, not necessarily the SKS.”  
11 (CVDoc. 71-1, at 29.) Trial counsel was concerned that, “we were going to be able to  
12 show that, yes, he pawned some weapons[,] [b]ut the Government was going to be able to  
13 come back and counterpunch and show, I think through Mr. Clark, that we - - that [Movant]  
14 went firing the SKS after this was pawned. ... And, again, my thought was what can - - how  
15 can we put out a defense without the Government coming back with a devastating  
16 response.” (Id., at 26.) Trial counsel was also concerned that the pawn shop records would  
17 know that Movant knew how to shoot an SKS-style rifle and had actually owned one.  
18 (CRDoc. 71-1, at 63.)

19 The most obvious flaw in trial counsel’s explanation for failing to investigate the  
20 pawn shop record relating to the SKS rifle is that Clark did testify at trial that he had shot  
21 an SKS rifle with Movant three to four weeks before the homicides; thus, the damaging  
22 evidence was before the jury. Despite this, the pawn shop records were consistent with a  
23 plausible argument that this SKS rifle was in pawn prior to the shootings for several  
24 reasons: (1) Clark told investigators in 2002 that Movant had pawned his guns before the  
25 shooting, (2) Clark’s statement that he had gone shooting with Movant 3 to 4 weeks before  
26 the homicides was given 5-years after the homicides, and, under that circumstance, is not  
27 that far off from the actual 11-week interval between the time the rifle was pawned and the  
28 homicides, and (3) Clark initially lied to investigators about the homicides, and did not

1 ultimately reveal the “truth” until 4 years after the murders. The cumulative affect of this  
2 evidence bears directly on Clark’s memory and credibility. Also, trial counsel raised the  
3 issue at trial about Movant having some “guns” and that they had all been pawned, and that  
4 Clark had been with Movant when they were pawned, during cross-examination of Clark.  
5 (CRDoc. 93, at 17.) Thus, further evidence that Movant was familiar with or owned a rifle  
6 would not have undermined trial counsel’s argument that any firearms that Movant owned  
7 were in pawn at the time of the homicides.

8 Trial counsel does not adequately explain why he did not further investigate the  
9 pawn shop records, or how a compelling argument could not have been made that Movant’s  
10 SKS rifle, which Clark so vividly described, was pawned a few months prior to the  
11 homicides. The only “counterpunch” by the Government would be to highlight the  
12 evidence already before the jury, that is, the accuracy of Clark’s recollection of when he  
13 and Movant had gone out together to shoot a rifle, and the fact that the pawn shop records  
14 do not conclusively prove that Movant did not have access to a different rifle to carry out  
15 the homicides.

16 It is difficult to conceive how this evidence would have hurt the defense in this case,  
17 and even harder to conceive of how it would not have been helpful to the defense. Trial  
18 counsel’s failure to further investigate the pawn shop records, or to seek their introduction  
19 into evidence fell below an objective standard of reasonableness.

## 20 PREJUDICE

21 Movant must affirmatively prove prejudice by “show[ing] that there is a reasonable  
22 probability that, but for counsel’s unprofessional errors, the result of the proceeding would  
23 have been different. A reasonable probability is a probability sufficient to undermine  
24 confidence in the outcome.” Strickland, 466 U.S. at 694. The prejudice component  
25 “focuses on the question whether counsel’s deficient performance renders the result of the  
26 trial unreliable or the proceeding fundamentally unfair.” Lockhart v. Fretwell, 506 U.S.  
27 364, 372 (1993) (citing Strickland, 466 U.S. at 687).

28

1        Due to trial counsel's failure to investigate and present evidence of Lee Jr.'s  
 2 confession, Movant was deprived of the right to fully defend his case. "Few rights are  
 3 more fundamental than that of an accused to present witnesses in his own defense."  
 4 Chambers v. State of Mississippi, 410 U.S. 284, 301 (1973). In Chambers, the defendant  
 5 had been charged with the murder of a state trooper, and, during trial, was limited by the  
 6 court in the cross-examination of a witness who had confessed to having been the shooter.  
 7 The witness admitted that he had confessed, but recanted, asserting that a clergyman had  
 8 talked him into confessing by promising that the witness would not go to jail and would  
 9 share in proceeds of a putative false arrest lawsuit. (Id., at 1044). Defendant was  
 10 prevented by the court from treating the witness as an adverse witness, or challenge directly  
 11 the witness's renunciation, and furthermore, was prevented from introducing the testimony  
 12 of three other witnesses who separately had heard the witness confess. (Id.) The United  
 13 States Supreme Court reversed the defendant's conviction, noting that,

14        In the exercise of [the fundamental right to present witnesses in his own  
 15 defense], the accused, as is required by the State, must comply with  
 16 established rules of procedure and evidence designed to assure both fairness  
 17 and reliability in the ascertainment of guilt and innocence. Although perhaps  
 18 no rule of evidence has been more respected or more frequently applied in  
 19 jury trials than that applicable to the exclusion of hearsay, exceptions tailored  
 20 to allow the introduction of evidence which in fact is likely to be trustworthy  
 21 have long existed. The testimony rejected by the trial court here bore  
 22 persuasive assurances of trustworthiness and thus was well within the basic  
 23 rationale of the exception for declarations against interest. That testimony  
 24 was critical to Chambers' defense. In these circumstances, where  
 25 constitutional rights directly affecting the ascertainment of guilt are  
 26 implicated, the hearsay rule may not be applied mechanistically to defeat the  
 27 ends of justice.  
 28 (Id., at 302).

22        In Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013), the Ninth Circuit Court of  
 23 Appeals found that it was objectively unreasonable for the state court to conclude that trial  
 24 counsel rendered effective assistance when he failed to interview a witness who would  
 25 testify that the victim fabricated her allegations of molestation and stated a motive for  
 26 doing so. 706 F.3d at 1162. The Court then found that, in determining prejudice, "[it] must  
 27 first consider whether [the evidence] could have been admitted at trial," ... and "[i]f the  
 28 evidence could have been admitted, [] whether there was a reasonable probability that it

1 would have affected the outcome of the proceeding.” Id., at 1163. “What matters is  
 2 whether a competent lawyer would have been able to introduce the evidence, in some form,  
 3 at trial.” (Id.) (citing Wiggins v. Smith, 539 U.S. 510 (2003)).

4 A defendant has a clearly established federal constitutional right to present a  
 5 complete defense. Crane v. Kentucky, 476 U.S. 683, 690 (1986). The right to present  
 6 relevant evidence is not unlimited, but subject to “reasonable restrictions, such as  
 7 evidentiary and procedural rules.” Moses v. Payne, 543 F.3d 1090, 1101 (9th Cir. 2008)  
 8 (citation and internal quotes omitted); 555 F.3d 742 (amended on den. of rehrg).  
 9 “Evidentiary rules do not violate a defendant’s constitutional rights unless they ‘infring[e]  
 10 upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes  
 11 they are designed to serve.’” Id., at 1102, 757 (citing Holmes v. South Carolina, 547 U.S.  
 12 319, 326 (2006)). It is difficult to narrow to one the evidentiary or procedural rule which  
 13 would have supported the admission of Lee Jr.’s confession at trial, because Movant’s  
 14 counsel did nothing to discover if Lee Jr. or Begay were available to testify, failed to  
 15 interview them, and failed to educate the trial judge adequately as to the confession and all  
 16 of the circumstances surrounding it. There are a multitude of conceivable avenues,  
 17 however: (1) Lee Jr. testifying consistent with his confession - not hearsay, relevant; (2)  
 18 Lee Jr. testifying inconsistent with his confession - impeachment with prior inconsistent  
 19 statement; (3) Lee Jr. declared unavailable - confession admitted as statement against  
 20 interest having sufficient indicia of trustworthiness/residual exception to the hearsay rule;  
 21 (4) Lee Jr. testifying inconsistent with his confession, denies confession - Begay called as  
 22 a witness to impeach Lee Jr. Trial counsel explored none of these avenues of admissibility.

23 “[E]xceptions tailored to allow the introduction of evidence which in fact is likely  
 24 to be trustworthy have long existed.” Chambers, 410 U.S. at 302. “[T]he exclusion of  
 25 [separately tried co-defendant’s statement exculpating defendant] cannot be justified  
 26 merely by shouting hearsay!” Rivera v. Director, Dept. of Corr., State of Ill., 915 F.2d 280  
 27 283 (7th cir. 1990). See also, Welcome v. Vincent, Sup., Greenhaven Corr. Facility, 549  
 28 F.2d 853, 859 (2nd Cir. 1977) (“to restrict examination of a witness, so that his prior

1 confession may not be proven, is to deny the defendant a fair trial, at least when the  
2 confession, though retracted, has some semblance of reliability.”). The confession of Lee  
3 Jr. bore indicia of trustworthiness: he was emotional when he confessed, his confession was  
4 to a close confidant, he described facts about the murders suggesting his personal  
5 involvement, said he shot the victim with a rifle and didn’t mean to shoot the female victim,  
6 his statement about the killings being over a “drug deal gone bad” was consistent with an  
7 anonymous call received by police after the murders, and Lee Jr. worked for his father, a  
8 bootlegger, and traded guns for alcohol. The evidence against Movant consisted of the  
9 testimony of Clark and Lee. There was no physical evidence linking Movant to the  
10 homicides. Jessica Lee was highly intoxicated and did not observe the shootings, and  
11 additionally is related to Lee Jr., and also worked for Lee Sr., the bootlegger. Clark was  
12 initially dishonest with investigators, and did not provide his trial account until years after  
13 the murders.

14 In consideration of the trial evidence, along with the confession of Lee Jr., as well  
15 as evidence that Movant pawned a rifle consistent with the one used in the shooting just  
16 weeks before the shootings, the Court concludes that the errors of counsel had a substantial  
17 and injurious effect on the jury, in that it was deprived of hearing all of the relevant  
18 evidence in the case. There is a reasonable probability that, but for counsel’s  
19 unprofessional errors, the result of the proceeding would have been different.

## 20 CONCLUSION

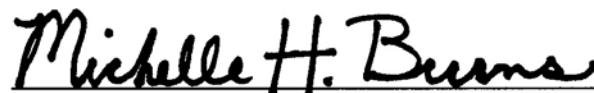
21 This Court having found a denial or infringement of Movant’s constitutional rights  
22 that affected his right to a fair trial, this Court will therefore recommend that Movant’s  
23 §2255 motion be granted, that judgment be set aside, and that a new trial be granted.

24 **IT IS THEREFORE RECOMMENDED** that Movant’s Motion Under 28 U.S.C.  
25 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CV Doc.  
26 1; CR Doc. 111) be **GRANTED**, that judgment be set aside, and that Movant be granted  
27 a new trial.

28

1        This recommendation is not an order that is immediately appealable to the Ninth  
2 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
3 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
4 parties shall have fourteen days from the date of service of a copy of this recommendation  
5 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
6 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
7 days within which to file a response to the objections. Failure timely to file objections to  
8 the Magistrate Judge's Report and Recommendation may result in the acceptance of the  
9 Report and Recommendation by the district court without further review. See United  
10 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file  
11 objections to any factual determinations of the Magistrate Judge will be considered a  
12 waiver of a party's right to appellate review of the findings of fact in an order or judgment  
13 entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules  
14 of Civil Procedure.

15        DATED this 7th day of November, 2014.

16          
17        Michelle H. Burns

18        Michelle H. Burns  
United States Magistrate Judge

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